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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 519

In the Matter of the Application of

JEROME BRICKER,

Petitioner,

for Admission to the Bar of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Respondent, the Committee on Character and Fitness of the Appellate Division of the New York Supreme Court, Second Judicial Department, opposes the petition herein and asks that it be denied.

Statement

Petitioner seeks a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, entered May 28, 1969.

The judgment which petitioner seeks to have reviewed had affirmed, "solely on the ground that appellant failed to comply with all the requirements as to residence (CPLR, 9406, subd. 3)," an order of the Appellate Division, Second

Department, entered March 18, 1968, which had denied petitioner's *renewed* application for admission to the Bar of the State of New York "on the sole ground that the applicant had failed to comply with all the requirements as to residence in New York" (6a, 9a).

The New York Court of Appeals did not even purport to pass upon any constitutional question. Annexed hereto, as Appendix A, is a schedule of papers transmitted to the New York Court of Appeals, on July 18, 1968, by the Appellate Division. These papers will show that neither the Appellate Division nor the Court of Appeals ultimately passed upon any question except that of petitioner's non-continued New York residence.

Facts

(1)

Petitioner's 1961 application for admission to the Bar of the State of New York was denied by the Appellate Division on May 7, 1962, which denied reconsideration of that application on November 26, 1962.

(2)

His petition sworn to July 20, 1966, sought "a hearing and determination *de novo* of his prior application" (3a). Reconsideration was sought not only on due process grounds, by reason of the Committee's failure in 1962 to give petitioner notice of charges as required by this Court's decision in 1963 in *Willner* v. *Committee on Character*, 373 U. S. 96, but also on the ground that when his 1962 hearing was held "it was during a period of his life when he was under severe emotional strain" (Melamed affidavit of July 19, 1966, p. 3; Bricker affidavits of October 26, 1962 and July 20, 1966).

The Appellate Division, on October 26, 1966, granted the petition to the extent of referring it to its Committee

on Character and Fitness (hereinafter called the Committee) for (4a):

> "(a) investigation and heearing as to whether the applicant *presently* possesses the requisite character and fitness for an attorney at law; and (b) a report setting forth the Committee's findings and recommendations." (Italics supplied)

The Appellate Division further ordered that (4a):

> "in the event the Committee recommends denial of the application, its report shall contain appropriate findings showing the basis for the recommendations. In the event the Committee recommends that the applicant be admitted to the Bar, no findings need be set forth in the report."

Finally, the Appellate Division ordered that "pending the investigation, hearing and report, the application shall be held in abeyance" (4a).

(3)

Hearings were held by the Committee on June 22, 1967 and August 15, 1967, subsequent to the petitioner's filing on January 13, 1967 of a *new* application for admission, which was resworn to on January 16, 1967 and April 10, 1967. Notices of hearing were sent to the petitioner in advance of the hearings, on June 2, 1967 and August 2, 1967. Annexed hereto as Appendix "B", is a copy of the letter dated June 2, 1967, informing petitioner of the subjects to be considered at the Committee's hearing (*infra*, pp. 9-11). The August 2, 1967 letter notified petitioner that his residence would be covered at the August 15, 1967 hearing.

Petitioner had informed the Committee, by letter dated July 7, 1967, that his address had been changed, on July 1, 1967, to 33 Back Drive, Edison, New Jersey.

(4)

The *Committee* made the following unanimous report, dated October 4, 1967, to the Appellate Division:

> "The Committee finds that the applicant demonstrated, in his original questionnaire and the proceedings incidental to it and in his current questionnaire, and in the hearing of June 22, 1967, that he was careless, indifferent, negligent, and inaccurate in his answers under oath to questions put to him in writing and orally. The answers, when furnished, however are not of a nature that would cast doubt upon his character. The Committee is persuaded and finds that there never was, nor is there now any actual intent to misrepresent to, or practice a fraud upon, the Committee.
>
> Although the Committee finds the applicant possesses the requisite character, it also finds that the applicant lacks the general fitness to practice law.
>
> In addition, the Committee unanimously finds that applicant has not been an actual resident of the State of New York since July 1, 1967.
>
> Accordingly, the Committee recommends that the application be denied."

ARGUMENT

No substantial federal question is presented by this petition.

(1)

Neither the Appellate Division of the New York Supreme Court nor the New York Court of Appeals purported to pass upon any constitutional question. *Cf. Willner* v. *Committee on Character*, 373 U. S. 96, 102 (1963), where the Court of Appeals had amended its remittitur to recite that upon the appeal to that Court there was presented "and necessarily passed upon a question under the Con-

stitution of the United States." See also *Willner* (373 U. S., at p. 106), where Mr. Justice DOUGLAS refused to reject the Court of Appeals' statement that it had "necessarily" decided a constitutional question.

(2)

Next, we note that, under the procedure adopted by the Respondent, the application which was pending before it when petitioner changed his residence was not his original 1961 application, but the new application filed by him in 1967, pursuant to the Appellate Division's permission to renew his application for admission. The requirement of "continued" residence in New York until the disposition of an "application for admission to practice" had been enacted by L. 1965, Ch. 675 and had become effective in September 1965, prior to the date of petitioner's new application.

(3)

Further, it should not be overlooked that the Appellate Division, upon the record before it, had in 1966 referred petitioner's application for admission to practice to respondent for investigation and hearing as to whether he "presently" possessed the requisite character and fitness for an attorney at law (4a). Respondent was not directed to treat the 1961 application as a continuing one, a direction that would have been particularly inapposite in the light of the fact that (1) his record contained indications that he had in 1957, and possibly on three other occasions applied for admission to the *Florida* Bar (Appendix B) prior to his 1961 application to New York for admission; and (2) that in 1961, petitioner's emotional upsets set forth as exculpatory facts in 1966 in seeking a reappraisal of his character, seem to have warranted his rejection at that time. Clearly, both the Appellate Division and the Respondent were concerned with the petitioner's status as of the time of his 1967 reapplication to New York.

(4)

There is nothing in this Court's decision in *Willner* (*supra*), which indicates that this Court's decision in that case should be given *retroactive* effect. If petitioner had not been accorded due process by the methods employed in 1962 in passing upon his 1961 application, he did not by reason of such deprivation of his appropriate procedural rights, obtain a substantive right to admission to the New York Bar, regardless of character and fitness. He became entitled to and was accorded proper notice and hearing in connection with the opportunity he was afforded by the Appellate Division to re-apply for admission (Appendix B).

Indeed, in *Willner*, this Court made it abundantly clear that, even when it found that appropriate notice and hearing had not been given an applicant, *Willner* had not obtained an absolute right to admission. This Court remanded *Willner's* application to the New York Courts for further disposition in accordance with the Court's opinion (373 U. S. 96, 106, 109; 375 U. S. 950, denying motion to amend mandate). Petitioner, even if he had pursued his rights as energetically as *Willner* had, would not have obtained a vested right to admission. See *Pearsall* v. *Great Northern R.R.*, 161 U. S. 646 (1896); *Re McGlone*, 284 N. Y. 527 (1940), aff'd 314 U. S. 556 (1942). Since petitioner did not even seek review of his 1961 application either by the New York Court of Appeals or by this Court, he is in no position to challenge New York's right to weigh in accordance with its 1967 standards the renewed application which New York allowed him to make in 1967.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, September 2, 1969

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York
Attorney for the Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

APPENDIX A

Schedule of papers transmitted by Appellate Division to Court of Appeals on July 18, 1968.

1. Application for admission to the Bar, verified March 29, 1961 and resworn to April 3, 1961; Application for admission to the Bar, verified January 13, 1967 and resworn to April 10, 1967, together with all the papers annexed thereto, including minutes of hearing September 27, 1961;
2. Certification of State Board of Law Examiners, dated January 18, 1961;
3. Order of Appellate Division, dated May 7, 1962, denying 1961 application;
4. Order of Appellate Division, dated November 26, 1962 denying reconsideration of application for admission, with affidavit of applicant, dated October 26, 1962;
5. Order of Appellate Division, dated October 26, 1966 referring application for admission to Committee on Character and Fitness, for investigation and hearing together with affidavits;
6. Report dated September 29, 1967 and recommendation dated October 4, 1967 of Committee on Character and Fitness; together with transcript of minutes of hearing June 22, 1967 and August 15, 1967 (pp. 1 to 154); exhibits A to G; and copy of application of Jerome Bricker for admission to Florida Bar;
7. Order of Appellate Division, dated March 18, 1968 denying renewed application for admission to the Bar;
8. Order of Appellate Division, dated May 20, 1968 with accompanying papers granting leave to appeal to the Court of Appeals * * *.

APPENDIX B

Mr. Jerome Bricker
137-75 Geranium Avenue
Flushing, New York 11355

Dear Mr. Bricker:

Your application for reconsideration of your application for admission to the Bar has been referred to a Subcommittee, to take proof of all relevant facts and circumstances relating to, or bearing upon, the following matters, and to report thereon to the full Committee, namely:

(1) The omission in your sworn original application for admission to the Bar of this State (filed February 20, 1961) of residences, traffic and parking violations, indebtedness, lawsuits against you, place of employment, membership in the Marine Corps Reserve, and other organizations.

(2) The improper registration of your automobile.

(3) Your initial inability to recall the service upon you of a subpoena in supplementary proceedings.

(4) The dates of your employment by Allstate, and reason for termination of said employment.

(5) The failure, at any time, in connection with the aforesaid original application, to indicate that you had lived in Florida and had applied for admission to the Florida Bar examination in 1957, followed by three supplemental applications all sworn prior to 1961 application herein.

(6) Your failure to advise the Florida Bar Examiners on the occasion of your 1957 application and the said three supplemental applications:

(a) of every residence you had;

(b) of your membership in the Marine Corps Reserve;

Appendix B (Continued)

(c) of each employer by whom you had been employed, and

(d) of traffic offenses.

(7) Your failure in your sworn application to the Florida Bar Examiners in 1966, to advise:

(a) of each employer by whom you had been employed;

(b) of the claims made against you, and

(c) of each and every club, organization, etc. of which you had been a member.

(8) Your failure to advise in your sworn application for reconsideration, filed here January 16, 1967:

(a) of your employment by Edison Coffee Shop;

(b) of your employment by the County Abstract Corp., and

(c) of a speeding violation in Eastchester, New York in 1955.

(9) Your failure to list in your application to the State Liquor Authority your employment by the Hamla Corp.

(10) Such other and further matters as may properly come before the Subcommittee.

A hearing will be held at the office of the Committee, Room 666, Supreme Court Building, Brooklyn, New York, on Thursday, June 22, 1967, at 2:30 p.m.

You may, if you wish, at all times be represented by a duly licensed attorney-at-law of this State. Subpoenas, if desired, may be obtained through this office.

At such hearing, you are entitled to cross-examine any witnesses called therein, and to examine and, at your ex-

Appendix B (Continued)

pense, to make copies of any documents or other papers offered in evidence, and to obtain a copy of the transcript of such hearing at your expense.

If any new matters may be developed at the said hearing, even though not hereinabove specifically set forth, at the conclusion of said hearing, an opportunity will be afforded to you to present further proof at a later date as to any such new matters, or to furnish any proof in rebuttal of any evidence developed in said hearing; and to offer any other evidence which you deem relative to your application.

If you or your attorney desire any further information as to the procedures in said hearing, same may be obtained from the undersigned.

Please advise the undersigned, in writing, whether you will appear at the time and place indicated.

Dated: June 2, 1967.

.....
Secretary

JFH:pp